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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

ARTURO SALINAS,)	
)	NO. 40902
Petitioner-Appellant,)	
)	ADA COUNTY NO. CV 2012-18119
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

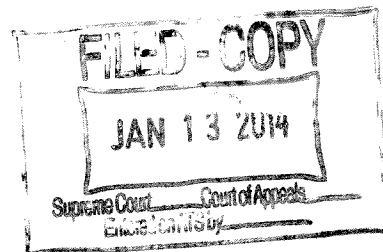
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STATEMENT OF THE CASE

Nature of the Case

Arturo Salinas appeals the summary dismissal of his petition for post-conviction relief, contending that there were genuine issues of material fact that supported his claim of ineffective assistance of counsel. Alternatively, he asserts that the district court improperly discredited his evidence for lack of proper certification and affirmation of truthfulness. In the further alternative, he asserts that the district court failed to give him any notice that his affidavits would not be considered because the certification or affirmation of truth was lacking. Therefore, the district court erred in dismissing Mr. Salinas's petition for post-conviction relief without an evidentiary hearing.

Statement of the Facts and Course of Proceedings

Mr. Salinas pled guilty to the use of a deadly weapon during the commission of an aggravated battery. (Tr., p.10, Ls.1-4.) The district court imposed upon him a unified sentence of twenty years, with five years fixed. (R., p.5.) Four days after receiving the sentence, Mr. Salinas contacted his attorney, seeking a sentence reduction. (R., pp.126-127.) An Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion was filed and the district court denied it approximately 22 days after the judgment of conviction was filed. (R., p.45.) Mr. Salinas did not appeal the judgment of conviction or the denial of his Rule 35 motion. (R., p.5.)

Mr. Salinas raised a number of claims in his timely verified petition for post-conviction relief. (R., pp.4-7.) Relevant to the issue raised in this appeal, Mr. Salinas asserted that "Counsel was ineffective when he did not seek to file an appeal of the sentence imposed; nor did he even speak to [Mr. Salinas] regarding the possibility of

filing an appeal of the sentence imposed.”¹ (R., pp.5-6.) The district court appointed counsel to represent Mr. Salinas on the claims involving his appellate rights. (R., pp.45-57.)

The State filed a motion for summary dismissal, seeking dismissal of Mr. Salinas’s claim that he received ineffective assistance of counsel for his attorney’s failure to consult with him about an appeal and to file an appeal. (R., pp.58-67.) The State asserted that Mr. Salinas never stated that he requested an appeal and that because the district court advised him of his rights to appeal the court’s decision, Mr. Salinas’s claims should be dismissed for failing to raise a genuine issue of material fact. (R., pp.64-66.)

In his response, Mr. Salinas asserted that he received ineffective assistance of counsel because his attorney did not file an appeal nor did the attorney consult with him about filing an appeal. (R., pp.91-92.) Mr. Salinas signed the response and provided an oath to its truthfulness. (R., p.93.) Additionally, Mr. Salinas filed an affidavit asserting that the public defender’s office represented him and he contacted his

¹ Mr. Salinas raised a number of other claims: (1) the district court lacked subject matter jurisdiction; (2) the sentence violated double jeopardy; (3) he received ineffective assistance of counsel because his attorney advised him to plead to a sentence that violated double jeopardy; (4) he received ineffective assistance of counsel because his attorney told him that the weapon enhancement would be dismissed; (5) his conviction violated due process because the State was allowed to dismiss and refile charges; and (6) he received ineffective assistance of counsel when his attorney failed to move to dismiss the charges. (R., pp.4-7, 8-30.) The district court provided its notice of intent to dismiss these claims. (R., pp.45-57.) After waiting the requisite time period, the district court dismissed the claims for which it had provided notice. (R., pp.99-110.) Mr. Salinas does not raise any issues about the claims the district court dismissed in its December 12, 2012 order.

attorney immediately after his sentencing hearing “to appeal and [to] file a motion to reduce [his] sentence.” (R., p.116.)

The State filed a supplemental motion for summary dismissal. (R., pp.123-127.) In it, the State argued that because the district court advised the petitioner of his right to appeal, the attorney had no duty to consult with the petitioner. (R., p.123.) The State also called into question the believability of Mr. Salinas’ affidavit that he asked his attorney to file the appeal. (R., p.142.)

In support of its request for dismissal, the State produced an affidavit of trial counsel, Craig Stevely. (R., pp.126-127.) Although the affidavit contained hearsay, it revealed that Mr. Salinas was not satisfied with the court’s sentence imposed upon him and he requested that his attorney file something to reduce his sentence. (R., pp.126-127.) Pursuant to this phone call received at the public defender’s office, Mr. Stevely filed a Rule 35 Motion the same day the judgment was filed with the court. (R., pp.126-127; see *also* Register of Actions of underlying criminal file attached as Appendix A.) Mr. Stevely asserted that Mr. Salinas never requested an appeal.² (R., pp.126-127.) Mr. Stevely did not deny that he failed to consult with Mr. Salinas about whether to file an appeal. (See R., pp.126-127.)

The district court summarily dismissed Mr. Salinas’ claims that he received ineffective assistance of counsel because his attorney neither consulted with him about an appeal nor filed an appeal on his behalf. (R., pp.128-136.) The district court

² This statement is hearsay because Mr. Stevely received second hand information about what Mr. Salinas’ wishes were about the sentence imposed when Mr. Salinas contacted the public defender’s office four days after the sentence was imposed. (R., pp.126-127.)

concluded that no material issue of fact existed as to whether counsel's performance was deficient and whether the deficiency prejudices petitioner's case; therefore, dismissed Mr. Salinas' petition for post-conviction relief. (R., pp.136-137.) Mr. Salinas timely appealed. (R., pp.138-140.)

ISSUES

- 1) Did the district court err in dismissing Mr. Salinas' petition for post-conviction relief without conducting an evidentiary hearing on his claim that he received ineffective assistance of counsel when his attorney failed to file an appeal on his behalf and failed to consult with him about an appeal?
- 2) Did the district court err when it failed to find that Mr. Salinas submitted admissible evidence for consideration of his claims?
- 3) Did the district court err in summarily dismissing Mr. Salinas' post-conviction claims on grounds for which he was given no prior notice?

ARGUMENT

I.

The District Court Erred When It Dismissed Mr. Salinas' Petition For Post-Conviction Relief Without Conducting An Evidentiary Hearing On His Claim That He Received Ineffective Assistance Of Counsel When His Attorney Failed To File An Appeal On His Behalf And Failed To Consult With Him About An Appeal

A. Introduction

Mr. Salinas asserts that the district court erred when it summarily dismissed his claims that he received ineffective assistance of counsel when his attorney failed to file an appeal on his behalf and failed to consult with him about an appeal. In his pleadings, Mr. Salinas asserted that his attorney failed to consult with him about whether to file an appeal and alleged that he told his attorney to file an appeal on his behalf.³ Because there are genuine issues of material fact as to whether Mr. Salinas' counsel was ineffective, Mr. Salinas respectfully requests that the district court's order summarily dismissing his ineffective assistance of counsel claims be vacated, with this case remanded to the district court for an evidentiary hearing.

B. Applicable Legal Standards

1. Summary Dismissal Standards

An application for post-conviction relief is civil in nature. *Gilpin-Grubb v. State*, 138 Idaho 76, 79-80 (2002). An application for post-conviction relief must be verified

³ As will be explained in Issue II, the district court erred when it erroneously discredited Mr. Salinas' affidavits and pleadings and gave them no weight. In the further alternative, if this Court finds reason to believe the record, affidavits, and pleadings were not sufficiently certified, then, as will be explained in Issue III, Mr. Salinas is entitled to notice before dismissing his claims on this ground.

with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

The court may summarily dismiss a petition for post-conviction relief when the court is satisfied the applicant is not entitled to relief and no purpose would be served by further proceedings. I.C. § 19-4906(b). In considering summary dismissal in a case where evidentiary facts are not disputed, summary dismissal may be appropriate, despite the possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between the inferences. *See State v. Yakovac*, 145 Idaho 437, 444 (2008) (addressing case where the State did not file a response to the petition) (citing *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519 (1982) (addressing case with stipulated facts).) However, where the facts are disputed, a court is required to accept the petitioner's un rebutted factual allegations as true, but need not accept the petitioner's conclusions. *Charboneau v. State*, 144 Idaho 900, 903 (2007).

Summary disposition on the pleadings and record is not proper if there exists a material issue of fact. I.C. § 19-4906. When genuine issues of material fact exist that, if resolved in the applicant's favor, would entitle the applicant to relief, summary disposition is improper and an evidentiary hearing must be conducted. *Baldwin v. State*, 145 Idaho 148, 153 (2008).

When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, the reviewing court applies the same standard as that applied by the district court. *Ridgley v. State*, 148 Idaho 671, 675 (2010). Therefore, on review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court

determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and liberally construes the facts and reasonable inferences in favor of the non-moving party. *Charboneau*, 144 Idaho at 903 (citation omitted). The lower court's legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716 (1997).

C. The District Court Applied An Incorrect Standard To Conflicting Affidavits At The Summary Dismissal Stage

At the summary dismissal hearing, the district court demonstrated that it had an incorrect understanding of post-conviction standards. (Tr.03/07/2013, p.11, Ls.3-14.) When the petitioner's attorney articulated the correct standard in that the facts should be viewed in the light most favorable to the non-moving party, at summary dismissal the district court said that was "not actually required" and that a different standard applied. (Tr.03/07/2013, p.11, Ls.3-14.) The district court applied an incorrect standard for summary dismissal.

"Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Vavold v. State*, 148 Idaho 144, 145 (2009) (emphasis added). Disputed facts must be construed in favor of the non-moving party, however, "[w]hen an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Yakovac*, 145 Idaho 437, 444 (quoting *Loomis v. City of Hailey*, 119 Idaho 434, 437 (1991)) (emphasis added).

This rule was taken from the prior civil case of *Loomis v. City of Hailey*. *Loomis*, in turn, dealt with a case in which the parties *stipulated* to the fact that there were no genuine issues of material fact – only questions of how the law should apply to the facts that were agreed upon by all parties. *Loomis*, 119 Idaho at 437.

In *Yakovac*, the underlying operative facts were not in dispute by the parties, as they involved trial counsel's failure to make certain evidentiary objections – the absence of which was apparent from the face of the trial record. *Id.* at 444-447. Thus, this rule from both *Yakovac* and *Loomis* arose out of, and is expressly limited to, only those cases where there is no disputed evidence regarding the issue to be determined by the trial court for summary disposition purposes.

The district court's understanding of the standard to be applied at summary dismissal was incorrect. The court erred when it did not view the disputed facts in the light most favorable to Mr. Salinas. As will be explained further below, applying the correct standard, Mr. Salinas is entitled to an evidentiary hearing.

D. A Material Issue Of Fact Exists On Whether Mr. Steveley Rendered Deficient Performance When He Failed To File A Timely Notice Of Appeal On Mr. Salinas' Behalf And Failed To Adequately Consult With Mr. Salinas About Filing An Appeal

Mr. Salinas raised two claims involving his right to receive effective assistance of counsel involving his appellate rights. (R., pp.6-7.) His first claim involved Mr. Steveley's failure to file an appeal. (R., pp.6-7.) The second involved Mr. Steveley's failure to consult with him about filing an appeal. (R., pp.6-7.)

The State moved on a general basis for summary dismissal because it believed Mr. Salinas asserted no material issue of fact entitling him to an evidentiary hearing.

(R., pp.58-67.) The State asserted that Mr. Salinas never requested an appeal. (R., p.65.) Additionally, the State gave notice that it wanted Mr. Salinas' claim that he received ineffective assistance of counsel when his attorney failed to consult with him about his appellate rights dismissed. (R., pp.64-65.) Contrary to case law, the State argued that there is no duty to consult with the defendant about his appellate rights, especially when the district court advised a defendant that it has the right to an appeal. (R., pp.64-65.)

The State then filed a supplemental notice of intent to dismiss. (R., pp.122-127.) Again, the State moved on a general basis for dismissal because no genuine issue of material fact existed and the claim that Mr. Salinas wanted an appeal filed was "patently false." (R., p.122.) Modifying its previous assertion that no duty existed to consult with Mr. Salinas about his appellate rights, the State reasoned that because Mr. Salinas received a more favorable deal than negotiated and the court advised him about his appellate rights, the attorney was not ineffective for failing to consult with Mr. Salinas. (R., pp.122-127.) The State concluded by asking the court to disbelieve Mr. Salinas' affidavit, give all weight to Mr. Steveley's affidavit, and dismiss the petition. (R., pp.123-124.)

The district court determined that Mr. Steveley did not render deficient performance. (R., pp.133-134.) After discrediting all of Mr. Salinas' pleadings,⁴ the court concluded that that Mr. Salinas never spoke with his trial attorney about filing an appeal, never requested an appeal be filed, nor reasonably conveyed that he was

⁴ The district court's error is further elaborated on in Issue II.

interested in pursuing an appeal. (R., pp.133-134.) The district court concluded no genuine issue of material fact existed. (R., pp.128-135.)

The district court's decision to summarily dismiss Mr. Salinas' petition for post-conviction relief should be reversed because a genuine issue of material fact exists as to whether Mr. Salinas received ineffective assistance of counsel when his attorney failed to file an appeal and failed to consult with him about his appellate rights.

1. Ineffective Assistance Of Counsel Standards

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right to counsel, which includes the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Further, the Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. *Id.* at 685.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Sixth Amendment "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* In light of the Sixth Amendment's reliance upon the legal profession's standards, the Idaho Supreme Court has stated that the starting point of evaluating criminal defense counsel's conduct is the

American Bar Association, Standards For Criminal Justice, The Defense Function. *Mitchell v. State*, 132 Idaho 274, 279 (1998).

In addition to proving deficient performance, in most instances a defendant also must prove that he was prejudiced. "The defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However, a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. As was recognized by Justice O'Connor, the author of the *Strickland* opinion, in her concurring opinion in *Williams v. Taylor*, 529 U.S. 362 (2000),

If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different."

Id. at 405-06 (O'Connor, J. concurring) (quoting *Strickland*, 466 U.S. at 696).

Despite the general rule, a presumption of prejudice arises in certain instances. This presumption applies when there is a complete denial of counsel during a critical stage of the proceedings, when circumstances are such that the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial, and when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. See e.g., *United States v. Cronin*, 466 U.S. 648, 659 (1984).

2. A Material Issue Of Fact Exists On Whether Mr. Salinas Instructed His Attorney To File An Appeal

“The decision whether to prosecute an appeal rests with the defendant.” *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993). Idaho courts have repeatedly recognized that, “where a criminal defendant advises his attorney of his desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his constitutional right to the effective assistance of counsel at a critical stage.” *Flores v. State*, 104 Idaho 191, 194-195 (Ct. App. 1983). Additionally, the United States Supreme Court has, “long held that a lawyer who disregards specific instructions to file a notice of appeal acts in a manner that is professionally unreasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Counsel does not make a strategic decision as to whether to file an appeal. *Id.* Rather, “filing a notice of appeal is a purely ministerial task, and the failure to file reflect[s] inattention to the defendant’s wishes.” *Id.* Thus, in a post-conviction proceeding, the question is whether the defendant conveyed to his attorney that he wanted an appeal or the attorney understood that an appeal should be undertaken. *Sanders v. State*, 117 Idaho 939, 940 (Ct. App. 1990).

The question presented in these types of cases is often whether the petitioner conveyed to his attorney a desire to file an appeal. In *Sanders*, a case that proceeded to an evidentiary hearing, the question was whether *Sanders* had told his attorney to file an appeal to challenge the sentence imposed. *Id.* The attorney testified that he could not recall being instructed to file an appeal and a second attorney, representing the petitioner during a sentence reduction proceeding, testified that the petitioner never mentioned filing an appeal nor inquired about his appeal. *Id.* Therefore, the district court concluded that there was insufficient evidence to conclude that the petitioner

conveyed to his attorney that he wanted an appeal filed. *Id.* The Court of Appeals determined that the case presented a credibility determination and that sufficient evidence existed at the evidentiary hearing to support the district court's findings. *Id.* at 941.

Like the instant case, in a number of other Court of Appeals' cases, the district courts failed to recognize that a genuine issue of material fact existed. For example, in *Mata*, the Court of Appeals found that the petitioner's verified petition for post-conviction relief asserting that his attorney declined to file an appeal on the petitioner's behalf was sufficient to entitle him to an evidentiary hearing on the matter. *Mata*, 124 Idaho 588, 593 (Ct. App. 1993). The case was remanded for the determination of whether *Mata* asked for an appeal to be filed. *Id.* In *Ricca v. State*, the petitioner asserted, in his petition, that he received ineffective assistance of counsel because his attorney failed to file an appeal despite his requests that one be filed. *Ricca v. State*, 124 Idaho 894 (Ct. App. 1993). The Court of Appeals remanded the case to the district court for an evidentiary hearing because a genuine issue of material fact existed. *Id.* The question to be decided was whether the petitioner communicated his intent to appeal to his attorney. *Id.* at 898. The court recognized that both the petitioner and the attorney may be called to testify at the evidentiary hearing to resolve the dispute before the district court. *Id.*

Unlike *Flores*, *Mata*, and *Ricca*, *supra*, in *State v. Beasley*, a remand was unnecessary for the district court's factual determination of whether the defendant had made known to counsel his desire to appeal because it was undisputed that the petitioner had conveyed his desire to appeal and his attorneys understood that the

petitioner wanted an appeal filed. *State v. Beasley*, 126 Idaho 356, 360 (Ct. App. 1994). Therefore, no evidentiary hearing was required on the deficient performance prong of the ineffective assistance of counsel claim that his attorney should have understood that the petitioner wanted an appeal filed. *Id.*

In the instant case, a genuine issue of material fact exists as to whether Mr. Salinas instructed Mr. Steveley to file an appeal on his behalf. In his petition for post-conviction relief, Mr. Salinas asserted that his attorney did not file an appeal on his behalf, and he specified the non-frivolous issue that may have been raised, *i.e.*, sentencing. (R., pp.6-7.) In further pleadings, Mr. Salinas noted that his attorney did not file an appeal on his behalf to challenge the sentence imposed. (R., p.92.) Finally, Mr. Salinas produced an affidavit asserting that he told Mr. Steveley to file an appeal and he failed to do so. (R., pp.116-117.) Mr. Steveley asserts that he was not instructed to file an appeal. (R., pp.126-127.) In the instant case, the operative facts are in dispute. Additionally, a probable inference that could be drawn from the evidence presented to the district court is that Mr. Salinas told Mr. Steveley's staff to do something about his sentence, which could have included an appeal. (Tr.03/07/2013, p.12, Ls.12-20.) Without the hearing, the court could not make a credibility determination. *Yakovac, supra*, does not support a conclusion to resolve the factual dispute without a hearing. The district court applied an incorrect standard when it did not construe the disputed facts in Mr. Salinas' favor. Without an evidentiary hearing, the district court could not have resolved the dispute. In light of Mr. Salinas' assertions, the district court erred in summarily dismissing his claim without an evidentiary hearing because he has submitted sufficient evidence that a genuine issue of material fact

exists as to whether Mr. Steveley had been instructed to file an appeal on Mr. Salinas' behalf.

3. Material Issue Of Fact Exists On Whether Mr. Salinas Rendered Ineffective Assistance Of Counsel For Failing To Consult With Mr. Salinas About His Appeal

The United States Supreme Court has held that it is not always deficient performance to fail to consult with a client about whether to file an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Prevailing professional standards establish that the decision of whether to file an appeal is ultimately to be made by the defendant, not the attorney. *ABA Standards for Criminal Justice: Prosecution and Defense Function*, (3d ed. 1991), Defense Function, Standard 4-5.2(a)(v). Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe*, 528 U.S. at 480. To “consult” with a defendant regarding filing an appeal has “a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.” *Id.* at 478. The United States Supreme Court expects that courts applying this test “will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal.” *Id.* at 481.

Mr. Salinas submits that his attorney had a duty to consult with him under either test. First, a rational defendant would want to appeal the sentence imposed. Mr. Salinas received a substantial sentence, twenty years and, although the fixed time

was five years less than recommended by the State, it is still substantial (five years). (Tr.09/15/2011, p.2, Ls.12-14; R., pp.5-6.) However, even assuming that this court is uncomfortable concluding that a rational defendant would want to appeal his sentence, a material issue of fact remains that Mr. Salinas reasonably demonstrated to counsel that he was interested in appealing. According to the register of actions of the underlying criminal case (attached as Appendix A), the Rule 35 motion was filed the same day as the judgment of conviction was filed, a clear indication that someone, *i.e.*, Mr. Salinas, was not satisfied with the sentence imposed. The evidence presented by the State demonstrated that on November 14, 2012, Mr. Salinas was dissatisfied with the sentence imposed and contacted the public defender's office. (R., p.126.) If a client immediately seeks some relief from the sentence, the attorney, at a minimum has a duty to consult with the defendant to determine if the defendant wants to appeal the court's decision. A genuine issue of material fact exists as to whether Mr. Steveley should have understood that Mr. Salinas was interested in appealing, triggering his duty to consult with Mr. Salinas. There is no evidence that Mr. Steveley discussed with Mr. Salinas the advantages and disadvantages of taking an appeal or made a reasonable effort to discover Mr. Salinas' wishes. See *Roe*, 528 U.S. at 478. Therefore, a genuine issue of material fact exists as to whether trial counsel rendered deficient performance when he failed to consult with Mr. Salinas about filing an appeal, and therefore, the matter should be remanded to the district court for further proceedings.

4. Mr. Salinas Was Prejudiced By Mr. Steveley Failures Because Mr. Salinas Was Deprived Of Counsel At A Critical Stage Of The Proceedings And Denied Appellate Proceedings Altogether

When an attorney renders deficient performance by failing to file a requested notice of appeal or by failing to properly consult with the defendant about an appeal, and that failure results in the forfeiture of an appeal, “counsel’s deficient performance has deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether.” *Roe*, 528 U.S. at 482-83. The denial of counsel during a critical stage and the resulting denial of an entire judicial proceeding “demands a presumption of prejudice.” *Id.*

Taking Mr. Salinas’ factual assertions as true, prejudice is presumed in this instance. There is a genuine issue of material fact, which, if resolved in Mr. Salinas’ favor, would entitle Mr. Salinas to relief such that the district court erred when it summarily dismissed this claim.

II.

The District Court Erred When It Failed To Find That Mr. Salinas Submitted Admissible Evidence For Consideration Of His Claims

A. Introduction

The district court erred discrediting all of Mr. Salinas’s pleadings. Because there are genuine issues of material fact as to whether Mr. Salinas received ineffective assistance of counsel, Mr. Salinas respectfully requests that the district court’s order summarily dismissing his ineffective assistance of counsel claims be vacated, and this case remanded to the district court for an evidentiary hearing.

B. The District Court Erred When It Summarily Dismissed Mr. Salinas' Petition For Post-Conviction Relief Because Mr. Salinas Produced Sworn Pleadings Constituting Admissible Evidence To Support His Claims

The district court discredited all of Mr. Salinas' evidence when ruling on the motion for summary dismissal. (R., p.133.) First, the district court erroneously found that, "The Petitioner did not file an affidavit with his petition to support his conclusory allegation." (R., p.133.) Then the court erred in concluding that Mr. Salinas failed to assert the facts in his petition to be true and correct as required by Idaho Code § 19-4902. (R., p.133, n.2.) Then, the court discredited Mr. Salinas' affidavit drafted by his attorney. (R., p.133.) Finally, the court concluded that Mr. Salinas presented no admissible evidence for consideration of his claims. (R., pp.133-134.)

Mr. Salinas asserts the district court erred in discrediting and ignoring all of his evidence and has misapplied the standard for reviewing summary dismissal motions. He contends he filed a verified petition, affidavits, pleadings, documents, and records that all support his claim that he received ineffective assistance of counsel.

Idaho code section 19-4902 provides, in part:

A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. . . . Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The supreme court may prescribe the form of the application and verification.^[5]

I.C. § 19-4902 (emphasis added). Idaho Code § 19-4903 provides:

⁵ The verification provided by the Idaho Supreme Court is as follows: "I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true." Idaho Criminal Rule 57. The verification utilized by Mr. Salinas is sufficiently comparable and contains the key language "true and correct" as required by the statute. I.C. § 19-4902.

The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 19-4902. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations, and discussion of authorities are unnecessary.

I.C. § 19-4903 (emphasis added).

“A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is in substance an affidavit, and is accorded the same probative force as an affidavit.” *Mata*, 124 Idaho at 593. In *Mata*, the petitioner verified the petition consistent with Idaho Code § 19-4902. *Id.* at 593. He swore that the application was “true and correct.” *Id.* Therefore, the Court of Appeals concluded that the State’s argument that the petitioner failed to support his application with an affidavit as contemplated by the statute was without merit. *Id.*

In this case, Mr. Salinas signed his petition for post-conviction relief. (R., p.7.) He made an oath and had the oath notarized. (R., p.7.) The oath provided, “I am the Petitioner herein. I have read the enclosed Petition for Post Conviction Relief. I know the contents thereof and believe them to be true and correct to the best of my belief.” (R., p.7.) The petition set out the evidentiary facts that were within Mr. Salinas’ personal knowledge. He swore the information to be “true and correct.” (R., p.7.) This is the exact language Idaho Code § 19-4902 utilizes. Thus, his petition is sufficient to constitute an affidavit. See *Mata*, 124 Idaho at 593.

In his petition, Mr. Salinas stated, "Counsel was ineffective when he did not seek to file an appeal of the sentence imposed; nor did he even speak to me regarding the possibility of filing an appeal of the sentence imposed." (R., pp.6-7.) Therefore, Mr. Salinas asserted two things in his affidavit. First, the trial attorney did not file an appeal to challenge the sentence imposed. (R., pp.6-7.) Second, the trial attorney did not consult with Mr. Salinas about appealing. (R., pp.6-7.) There is nothing more for Mr. Salinas to add or elaborate. These facts are in his knowledge and he has verified the facts to be true and correct.

Mr. Salinas attempted to elaborate on his claim in the Petitioner's Response to Motion for Summary Dismissal, filed November 15, 2012. (R., pp.86-93.) Mr. Salinas attempted to point out the errors in the State's argument in that an attorney could be ineffective for failing to consult with his client about filing an appeal. (R., pp.90-92.) Again, Mr. Salinas asserts in this response, his attorney failed to consult with him about filing an appeal and failed to file an appeal on his behalf. (R., pp.90-92.) (Asserting, "as counsel did not speak to the Petitioner about filing an appeal" and "Counsel did not file an appeal of the sentence imposed.") Filing the pleadings *pro se*, Mr. Salinas attempted to swear to the accuracy of his statements. (R., p.93.) The asserted facts made in the response are no different than the facts asserted in his petition and should not have been discredited by the district court.

On February 7, 2013, with the assistance of his attorney, Mr. Salinas filed an affidavit in support of his claims. (R., pp.116-117.) In this affidavit, Mr. Salinas asserted, "Immediately after my sentencing hearing I asked my attorney to appeal and file a motion to reduce my sentence." (R., p.116.) Mr. Salinas asserted that he was

sworn under oath, which indicated that the contents of the affidavit are true and correct. (R., p.116.) He signs the affidavit and it is notarized. (R., p.116.) This document is evidence pursuant to Idaho Code §§ 19-4902 and 4903 and should not have been discredited by the district court.

Therefore, a verified petition may be sufficient to meet the requirements of I.C. § 19-4903. *Id.* According to I.C. § 19-4903, an applicant need not argue its facts, use citations to support its facts, or discuss any authority to support its factual contention of the errors made in the applicant's case. The applicant must present facts within the applicant's personal knowledge. I.C. § 19-4903. An applicant may support the petition with affidavits, records, or other evidence. I.C. § 19-4903. Here, Mr. Salinas provided a verified petition constituting an affidavit. He made assertion of facts from his personal knowledge and swore those facts to be true and correct. He provided a response which reiterated the previous assertions, and he again attempted to assert the facts as true and correct. He filed an affidavit prepared by his attorney taking an oath that the assertions made in the pleading were true and correct. Therefore, Mr. Salinas did provide admissible evidence to be considered for his claims.⁶

⁶ As an aside, the district court gave significant weight to Craig Steveley's Affidavit although it lacked significant assertions of truth, more-so than any of Mr. Salinas's documents. In the Steveley Affidavit, the attorney asserted at the beginning of the document that he is "sworn." There is no assertion what he is sworn to do, such as, to tell the truth. Additionally, the document is simply notarized with no affirmation. The notarization does nothing more than to indicate that the person that signed the affidavit is Craig Steveley. The court's attempt to give all weight to this "affidavit" and none to Mr. Salinas' affidavit based on incorrect affirmations, verifications, or notarizations is disturbing.

III.

Assuming That Mr. Salinas' Documents Lacked Sufficient Affirmation, The District Court's Decision To Dismiss The Petition For Post-Conviction Relief Based On This Rationale Should Be Reversed Because Mr. Salinas Lacked Any Notice That The District Court Would Be Ignoring His Evidence Based On This Reason, And Therefore, The Petition Was Dismissed On A Basis For Which He Had No Notice

A. Introduction

Mr. Salinas asserts that the district court dismissed his petitions on a basis for which he was not given any notice, by either the State or the district court. As such, Mr. Salinas was not afforded any notice of the reason for dismissal, and was also denied an opportunity to respond and attempt to cure any alleged defects in his petition.

B. Mr. Salinas Received No Notice That The District Court Was Dismissing His Petition For Post-Conviction Relief On The Basis That His Petition, Affidavit, And Other Evidence Were Not Sufficiently Certified To Be Admissible

The UPCPA allows the district court to summarily dismiss a petition for post-conviction relief on its own motion or in response to the State's motion. I.C. § 19-4906(b) & (c). In either case, though, the petitioner must be given prior notice of the specific reason(s) for dismissal, as well as an opportunity to respond. I.C. § 19-4906(b); see *Saykhamchone v. State*, 127 Idaho 319, 322 (1995); *Baruth v. Gardner*, 110 Idaho 156, 159-60 (Ct. App. 1986); *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). The purpose of this requirement is to give the petitioner an opportunity to challenge the decision before it is finalized. *Baruth*, 110 Idaho at 159-60. Thus, this requirement is strict; it makes no difference whether the petitioner's claims are meritorious or not. *Cherniwchan v. State*, 99 Idaho 128, 129-30 (1978). A case may not be dismissed on grounds for which the petitioner received no notice. *Ridgley v. State*, 148 Idaho 671, 676 (2010) (the court's notice was inadequate, however, the district court erred when it

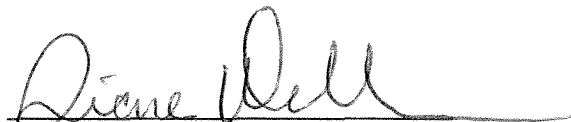
failed to summarily dismiss the petition on grounds asserted by the State in its motion for summary dismissal). An assertion that the petitioner received no notice of the reasons for dismissal may be asserted for the first time on appeal. See *Kelly v. State*, 149 Idaho 517, 522 (2010).

In the instant case, Mr. Salinas received no notice that the district court as discredited all of his affidavits, petitions, and other evidence because an improper affirmation had been provided. Had the district court or the State provided notice of the improper affirmation, the problem could have been easily remedied by Mr. Salinas and his attorney. Failure to give notice, deprived Mr. Salinas of any real opportunity to respond. Therefore, this Court should remand the matter for further proceedings.

CONCLUSION

Mr. Salinas respectfully requests that this Court reverse the district court's order summarily dismissing his petition for post-conviction relief.

DATED this 13th day of January, 2014.

A handwritten signature in black ink, appearing to read "Diane Walker", written over a horizontal line.

DIANE M. WALKER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ARTURO SALINAS
INMATE #55740
ISCI
PO BOX 14
BOISE ID 83707

LYNN NORTON
DISTRICT JUDGE
E-MAILED BRIEF

JOHN C DEFRANCO
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

DMW/eas

APPENDIX A

Case History

Cases for: **Salinas, Arturo**
Ada

6 Cases Found.

State of Idaho vs. Arturo Salinas					
No hearings scheduled					
Case: CR-FE-2011-0011897	District	Judge: Darla S. Williamson	Amount due: \$2,409.60	Closed pending clerk action	
Charges: Violation	Date Charge	Citation	Degree	Disposition	
08/03/2011 I18-907(1)(A)	Battery-Aggravated (Cause Great Bodily Harm or Disability)			Felony Finding: Guilty	
	Officer: Ada Co Officer-Generic,, AD			Disposition date: 11/10/2011	
				Fines/fees: \$225.50	
				Credited time (Yes): 130 days	
				Det Penitentiary: 5 years	
				Indet Penitentiary: 15 years	
08/03/2011 I19-2520	Enhancement-Use of a Deadly Weapon in Commission of a Felony		Felony	Finding: Guilty	
	Officer: Ada Co Officer-Generic,, AD			Disposition date: 11/10/2011	
				Fines/fees: \$0.00	

Register
of
actions: Date

08/04/2011 New Case Filed - Felony
 08/04/2011 Prosecutor assigned Julianne Meehan
 08/04/2011 Hearing Scheduled (Video Arraignment 08/04/2011 01:30 PM)
 08/04/2011 Hearing result for Video Arraignment scheduled on 08/04/2011 01:30 PM: Arraignment / First Appearance
 08/04/2011 Order Appointing Public Defender Ada County Public Defender
 08/04/2011 Judge Change: Administrative
 08/04/2011 Hearing Scheduled (Preliminary 08/17/2011 08:30 AM)
 08/04/2011 BOND SET: at 300000.00 - (I18-907(1)(A) Battery-Aggravated (Cause Great Bodily Harm or Disability))
 08/04/2011 Order Appointing Public Defender
 08/04/2011 Order Appointing Public Defender
 08/05/2011 Notification of Penalties for Escape
 08/10/2011 Motion For Bond Reduction
 08/10/2011 Notice Of Hearing
 08/10/2011 Defendant's Request for Discovery
 08/17/2011 Hearing result for Preliminary scheduled on 08/17/2011 08:30 AM: Hearing Held
 08/17/2011 Hearing result for Preliminary scheduled on 08/17/2011 08:30 AM: Bound Over (after Prelim)
 08/17/2011 Hearing Scheduled (Arraignment 09/01/2011 09:00 AM)
 08/17/2011 Commitment
 08/19/2011 Motion to Consolidate/FE-2011-10039

08/22/2011 Information

Hearing result for Arraignment scheduled on 09/01/2011 09:00 AM:
09/01/2011 District Court Arraignment- Court Reporter: Penny Tardiff Number of
Pages: Less than 100

09/01/2011 Hearing Scheduled (Entry of Plea 09/15/2011 08:30 AM)

09/01/2011 Order to Consolidate (with CRFE11-10039)

Hearing result for Entry of Plea scheduled on 09/15/2011 08:30 AM:
09/15/2011 District Court Hearing Held Court Reporter: Penny Tardiff Number of
Transcript Pages for this hearing estimated: Less than 100

09/15/2011 Hearing Scheduled (Sentencing 11/03/2011 10:00 AM)

09/15/2011 A Plea is entered for charge: - GT (I18-907(1)(A) Battery-Aggravated
(Cause Great Bodily Harm or Disability))

09/15/2011 A Plea is entered for charge: - GT (I19-2520 Enhancement-Use of a
Deadly Weapon in Commission of a Felony)

09/15/2011 Guilty Plea Advisory

09/15/2011 Order for Pre-Sentence Investigation Report and Mental Health
Assessment

Hearing result for Sentencing scheduled on 11/03/2011 10:00 AM:
11/03/2011 District Court Hearing Held Court Reporter: Penny Tardiff Number of
Transcript Pages for this hearing estimated: Less than 100

11/03/2011 Hearing Scheduled (Disposition 11/10/2011 10:00 AM)

Hearing result for Disposition scheduled on 11/10/2011 10:00 AM:
11/10/2011 District Court Hearing Held Court Reporter: Penny Tardiff Number of
Transcript Pages for this hearing estimated: Less than 100

11/10/2011 Finding of Guilty (I18-907(1)(A) Battery-Aggravated (Cause Great
Bodily Harm or Disability))

11/10/2011 Sentenced to Jail or Detention (I18-907(1)(A) Battery-Aggravated
(Cause Great Bodily Harm or Disability)) Confinement terms: Credited
time: 130 days. Penitentiary determinate: 5 years. Penitentiary
indeterminate: 15 years.

11/10/2011 Sentenced To Pay Fine 225.50 charge: I18-907(1)(A) Battery-
Aggravated (Cause Great Bodily Harm or Disability)

11/10/2011 Order for Restitution and Judgment

11/10/2011 Finding of Guilty (I19-2520 Enhancement-Use of a Deadly Weapon in
Commission of a Felony)

11/10/2011 STATUS CHANGED: closed pending clerk action

11/10/2011 No Contact Order: Criminal No Contact Order Filed Expiration Days:
7305 Expiration Date: 11/10/2031

11/10/2011 Restitution Recommended by the Prosecutor's office. 658.74 victim # 1

11/10/2011 Restitution Recommended by the Prosecutor's office. 1296.67 victim #
2

11/15/2011 Judgment & Commitment

11/15/2011 Motion for Reconsideration of Sentence and for Leave

12/01/2011 Objection to Motion for Reconsideration of Sentence and For Leave

12/07/2011 Order Denying Motion to Reduce Sentence

State of Idaho vs. Arturo Salinas
No hearings scheduled

Case: **CR-FE-2011-0010039** Magistrate Judge: **David E. Day** Amount due: **\$0.00** **Closed**

Charges:	Violation Date Charge	Citation Degree	Disposition
	07/03/2011 I18-907(1)(A)	Felony	Finding: Dismissed